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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6861

RICHARD LEE WHITLEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The Commonwealth of Virginia, the respondent herein, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on January 22, 1982, not be granted.

For purposes of uniformity, the parties will hereinafter be referred to as the petitioner and the respondent, and all page references will be to the Joint Appendix filed in the Supreme Court of Virginia by the petitioner and respondent and designated (App. ____), and to the Supplemental Appendix filed therein by the respondent and designated (Supp. App. ____).

OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the Circuit Court of Fairfax County is reported

at 223 Va. ____, 286 S.E.2d 162 (1982). The unreported opinion of the Supreme Court of Virginia denying petitioner's Petition for Rehearing is set forth in the Appendix to the petition for a writ of certiorari at p. 3a.

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether petitioner was denied due process of law and subjected to cruel and unusual punishment because his death sentence rests upon a finding of an "aggravated battery" which is defined by the Supreme Court of Virginia as being "more culpable than the minimum necessary to accomplish an act of murder?"

II. Did the Supreme Court of Virginia impermissibly shift the burden of proving that petitioner's motive for committing murder was something other than robbery to petitioner, thus refusing to apply Virginia law that the Commonwealth must disprove beyond a reasonable doubt all reasonable hypotheses of innocence?

STATEMENT OF THE CASE

On July 25, 1980, the petitioner, Richard Lee Whitley, entered the house of Mrs. Phebe C. Parsons, a 63-year-old widow and his next door neighbor. He began choking Mrs. Parsons in her living room with his hands. They fell to the floor and petitioner then began choking her with a rope. After choking Mrs. Parsons, he took a knife from his pocket and cut her throat. (App. 14-15).

Petitioner picked Mrs. Parsons up under her arms and dragged her into a bedroom, leaving her on the floor. He then commenced ransacking her house in order to find a gun he was looking for. (App. 12). Petitioner never found the gun, but did take several credit cards and the keys to Mrs. Parsons' automobile. (App. 13). There was evidence that Mrs. Parsons' wallet had been taken from her purse. (App. 61). Petitioner then took Mrs. Parsons' automobile and traveled to Florida (App.

18). The month before, petitioner had discussed buying an automobile from the victim's daughter. (Supp. App. 1-2).

On July 28, 1980, Mrs. Parsons' daughters visited her house because they had not heard from her. Upon entering the house, Susan Parsons noticed that paper was all over the floor, a lamp was knocked over, furniture was out of place and magazines were spread across the room. She also noticed a "lot of stains on the rug." (App. 64). Upon entering her mother's bedroom, she saw that clothing had been piled on the floor and that the bureau was messed up. She subsequently smelled the odor from her mother's decomposing body and saw a foot sticking from under the pile of clothes on the floor. (App. 65).

The police responded to a call from Susan Parsons, found the house in general disarray, and noticed that it had been ransacked. (App. 75-76). In addition, they found a large quantity of blood on the living room floor, and noticed blood-soaked women's underclothing, shoes and a shirt; following bloody footprints down the hallway to a bedroom, they saw the victim's foot sticking out from under the pile of clothes. (App. 77). After uncovering the body, they noticed that umbrellas had been inserted in Mrs. Parsons' vagina and anus, that a bloody palmprint had been left on the door leading into the room (later identified as petitioner's), and that a bloody footprint was in the middle of Mrs. Parsons' back. (App. 77-79, 86).

An autopsy of the victim's body revealed numerous injuries, including various bruises and lacerations, ligature marks on the neck, and a slash type wound in the left side of the neck four and three fourths inches long which gaped two inches and involved two major veins that had been severed. (App. 67-69). Besides these wounds, the two umbrellas which had been inserted into Mrs. Parsons' vagina and rectum had broken through the interior walls

of tissue. (App. 72-73). The autopsy showed that the victim's death could have been caused by either the strangulation or the wounds on her neck. (App. 69).

On August 1, 1980, Mrs. Parsons' green VW Rabbit was located in Okeechobee, Florida, by the police. Found in the auto were Exxon and Chevron gas receipts with the imprint of Mrs. Parsons' credit cards on them and a Rand McNally Road Atlas. (App. 98-100). The petitioner's fingerprints were on the atlas. (App. 135-136).

Petitioner was subsequently arrested in Florida and returned to Fairfax County. He admitted that he had killed Mrs. Parsons (App. 10-23) and took the Fairfax police to a spot on an interstate highway where he had thrown some of her clothes. Among the clothes was found a small medallion which had belonged to Mrs. Parsons' deceased husband. (App. 110-111, 130-131).

On May 13, 1981, the petitioner was convicted by a jury of capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia (1950), as amended. (App. 191-193). At the penalty phase of petitioner's trial, evidence was introduced showing that petitioner had told the Florida police that the last thing Mrs. Parsons did was to pray that he would not kill her, and that he cut her jugular vein because "they die quicker when you cut them there." (App. 199-200). Evidence was also introduced at the sentencing phase showing that petitioner knew it was wrong to kill Mrs. Parsons and that he could have stopped the murder if he had wanted to. (App. 208).

The jury recommended a sentence of death (App. 224-225), and on June 12, 1981, the trial court affirmed the jury's recommendation and sentenced petitioner to death. (App. 237). Petitioner then appealed his conviction and death sentence to the Supreme Court of Virginia, which accorded his case a priority status. On January 22, 1982, the Supreme Court of Virginia

affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate. On March 12, 1982, the Supreme Court of Virginia, finding no merit to the grounds assigned by petitioner, denied petitioner's Petition for Rehearing.

ARGUMENT

I. THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW AND WAS NOT SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BECAUSE HIS DEATH PENALTY RESTS UPON A FINDING OF AN "AGGRAVATED BATTERY" WHICH IS DEFINED BY THE SUPREME COURT OF VIRGINIA AS BEING "MORE CULPABLE THAN THE MINIMUM NECESSARY TO ACCOMPLISH AN ACT OF MURDER."

Section 19.2-264.4C of the Code of Virginia (1950), as amended, provides that the death penalty shall not be imposed unless the Commonwealth proves beyond a reasonable doubt that the defendant constitutes a continuing serious threat to society because there is a probability that he will commit criminal acts of violence in the future or that the defendant's conduct in the case at hand was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." The first aggravating circumstance, dealing with the future "dangerousness" of the defendant, is not involved in the instant case. Rather, petitioner's death sentence rests on the second circumstance dealing with the "vileness" of his crime.

Petitioner, while admitting that Code § 19.2-264.4C's "vileness" circumstance is identical to the aggravated circumstance found to be constitutionally sound by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), argues that the definition of "aggravated battery" adopted by the Supreme Court of Virginia is vague, overbroad and did not constitutionally limit the jury's discretion in ascertaining whether petitioner should be sentenced to death.

The respondent notes, however, that, in Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135 (1978), cert. denied,

441 U.S. 967 (1979), the Virginia Supreme Court construed the words "depravity of mind" to mean a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. The court further construed the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

The respondent submits, therefore, that the Supreme Court of Virginia has narrowed the definition of "aggravated battery" into language which can be easily understood. And this definition certainly gives a reasonably intelligent person fair notice that his contemplated conduct is forbidden by the statute. There is thus nothing vague or overbroad about the manner in which the Supreme Court of Virginia has defined the "vileness" aggravating circumstance as petitioner asserts. It must be recognized that only so much can be done with the English language, and the terms used by the Supreme Court of Virginia have commonly accepted meanings. Indeed, as this Court noted in Gregg with respect to Georgia's "vileness" statute, "[T]here is no reason to think the juries will not be able to understand it." 428 U.S. at 202 n. 54.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court concluded that determining aggravating circumstances may be hard, but they require no more line drawing than is commonly required of a fact-finder in a law suit. This Court further found that "the requirements of Furman [v. Georgia, 408 U.S. 238 (1972)] were satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." 428 U.S. at 258.

Petitioner, of course, asserts that in his case the Supreme Court of Virginia did not limit this arbitrariness and

capriciousness and compares his case to that of Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, a plurality of this Court concluded that the Georgia Supreme Court had adopted an overbroad and vague construction of the "vileness" circumstance in that particular case, but the facts of Godfrey are clearly different from the case at bar: The defendant in Godfrey (who was suffering from severe marital difficulties), after having a heated argument with his wife over the telephone, went to the trailer home where she was staying with her mother and daughter. There, he shot and instantly killed his wife and mother-in-law. At trial, the prosecutor conceded the absence of an "aggravated battery", thus leaving only "depravity of mind" as a remaining possibility. And the trial judge stated that there had been no physical harm or torture beyond the actual murders.

Respondent submits that the Supreme Court of Virginia was thoroughly justified in determining that petitioner's case is distinguishable from Godfrey, thus permitting a conclusion that petitioner had committed an "aggravated battery." First, the respondent notes that petitioner's emphasis on the Supreme Court of Virginia's comment in the instant case that "[t]he Supreme Court [in Godfrey] was not required to decide, and did not decide, whether an aggravated battery must precede the victim's death in order to satisfy the vileness standard," 286 S.E.2d at 169, is taken out of context and ignores the Virginia Supreme Court's actual holding in his case. After making this comment, which the respondent submits is an accurate analysis of Godfrey, the Court stated in the very next sentence as follows: "Nor need we decide that question here, for the evidence fully supports the conclusion that Mrs. Parson's death was the result of aggravated battery upon her person." (Emphasis added). Id. The Virginia High Court then went on to outline the "aggravated battery" which had been perpetrated on Mrs.

Parsons by the petitioner before her death:

> According to Whitley's own account, he first choked his defenseless victim with his bare hands; next, he acquired a rope and strangled her; and then, taking his knife from his pocket, he cut her throat. Each of Whitley's several acts was deliberate, each was brutal and potentially fatal, and, together, all were more than the minimum necessary to accomplish the murder. Id. at 170.

Indeed, the respondent notes that the Virginia Supreme Court specifically refuted petitioner's present claim that the only "aggravated battery" [1] to Mrs. Parsons did not take place until after her death: "We do not refer [with respect to aggravated battery] to Whitley's violent abuse of her body cavities.... Id.

The respondent respectfully submits, therefore, that the Supreme Court of Virginia clearly limited its construction of "aggravated battery" in the instant case as contemplated by this Court in both Gregg and Godfrey. The respondent points out further that the limiting construction given to "aggravated battery" in Smith v. Commonwealth, supra, by the Virginia Supreme Court not only is consistent with the plurality decision in Godfrey, but predates that decision by almost two years.[2]

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[1] The respondent also notes that petitioner's attempt to distinguish between "torture" and "aggravated battery" is misplaced. As stated by the Georgia Supreme Court in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977), and cited by this Court in Godfrey, "Considering torture and aggravated battery on the one hand as substantially similar treatment...." 446 U.S. at 431.

[2] The respondent submits further that petitioner's citation of Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), as exemplifying that almost any murder could be characterized under the Virginia Supreme Court's definition as "involving more than 'the minimum necessary to accomplish an act of murder'" is interesting in light of the fact that the instant claim was also made in Turner's petition for a writ of certiorari which was denied on May 18, 1981. 451 U.S. 1011 (1981). In any event, even if the Virginia Supreme Court had erred in Turner, which the respondent does not concede and submits that both the state and federal decisions in that case show otherwise, that has nothing whatsoever to do with the instant case in which the Supreme Court of Virginia constitutionally limited its construction of "aggravated battery:" Vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. United States v. Mazurie, 419 U.S. 544 (1974).

II. THE SUPREME COURT OF VIRGINIA DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROVING THAT PETITIONER'S MOTIVE FOR COMMITTING MURDER WAS SOMETHING OTHER THAN ROBBERY TO PETITIONER AND THUS DID NOT REFUSE TO APPLY VIRGINIA LAW THAT THE COMMONWEALTH MUST DISPROVE BEYOND A REASONABLE DOUBT ALL REASONABLE HYPOTHESES OF INNOCENCE.

Petitioner further asserts that this Court should grant his petition for a writ of certiorari because the Supreme Court of Virginia allegedly refused to apply Virginia law that the prosecution must "disprove beyond a reasonable doubt all reasonable hypotheses of innocence inferable from the facts, thus impermissibly shifting the burden of proof to petitioner" in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977).[3]

In Mullaney this Court concluded that a Maine law violated due process because it "affirmatively shifted the burden of proof to the defendant" upon "the critical fact in dispute" -- the presence or absence of malice -- thus increasing "the likelihood of an erroneous murder conviction." 421 U.S. at 701. Then, in Patterson this Court went to some lengths to point out the limitations of Mullaney and held that the requirements of In Re Winship, 397 U.S. 358 (1970), were satisfied when the prosecution proved beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged." 432 U.S. at 206.

As the basis for his claim that the Supreme Court of Virginia erroneously shifted the burden of proof to him, petitioner points to a single sentence in the Virginia Supreme Court's decision: "[T]he mere fact that the larceny did not occur until after [petitioner] had killed his victim does not prove that his

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[3] Petitioner does not claim that the instructions of the trial court in any way impermissibly shifted the burden of proof to him, and a review of the trial cour's instructions concerning the burden of proof clearly shows that the burden was not so shifted. (App. 155-162).

decision to steal was an afterthought." 286 S.E.2d at 166. However, petitioner, emphasizing the word "prove", has again taken something out of context and given it an erroneous construction.

The Virginia Supreme Court's comment to which he points directly follows the Court's statement that:

> Criminal intent, a state of mind, may be, and often must be, shown by circumstantial evidence. [Citation omitted]. Whitley contends that, in light of the circumstances disclosed by his extra-judicial statements and the physical evidence, the jury should have found that the killing was the act of a 'sexual psychopath' and that the larceny was committed only as an afterthought.' Id.

Then, after making the statement which petitioner cites as evidence of impermissible burden shifting, the Court went on to say:

> And the jury logically could have concluded that both sex and robbery motivated his conduct. Moreover, Whitley's hypothesis ... is legally significant only if it is reasonably supported by the evidence viewed in the light most favorable to the Commonwealth. His theory ignores certain facts bearing upon the question of intent. Id.

The respondent submits, therefore, that it is clear that the word "prove" was not used by the Supreme Court of Virginia in the sense of "burden of proof." Rather, it was merely a denial of petitioner's claim that certain facts could only lead to one conclusion. Indeed, petitioner admits that his argument to which the Virginia Supreme Court's comment was directed was "that the evidence taken in the light most favorable to the prosecution 'lead[s] unmistakably to the conclusion that he killed the victim in a berserk passionate rage and stole her property as an afterthought.'" (Petition for a Writ of Certiorari at 21). And any common sense reading of petitioner's argument is that he was saying that the evidence "proved" that he killed Mrs. Parsons in a rage and not during the commission of a robbery. The Virginia Supreme Court, in rejecting this claim, was merely stating that the facts did not "lead unmistakably" to petitioner's conclusion: The Court merely used the word "prove" instead of petitioner's phrase, "lead[s] unmistakably."

Moreover, petitioner's instant argument appears to be based on his further mistaken belief that all he had to do was present an "hypothesis of innocence" and the jury and State appellate court were bound to accept his version. Petitioner overlooks the fact, however, that the jury does not have to accept his "hypothesis of innocence": "The fact finder need not believe the accused's explanation and may infer that he is trying to conceal his guilt." Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608 (1981). And the Virginia Supreme Court, when reviewing petitioner's conviction on appeal, viewed the facts of his case in the light most favorable to the prosecution. Carter v. Commonwealth, 223 Va. ____, 290 S.E.2d 865 (1982). While this perhaps made petitioner's "burden of persuasion" more difficult on appeal,[4] it is a far cry from placing the "burden of proof" upon him to disprove that he murdered Mrs. Parsons during the commission of a robbery.

In any event, the respondent notes that the placing of the burden on the prosecution to rule out every reasonable hypothesis except that of guilt beyond a reasonable doubt is solely a matter of State law, not involving a federal constitutional right. See Holland v. United States, 348 U.S. 121 (1954); Jackson v. Virginia, 443 U.S. 307, 327 (1979). Here, petitioner asserted to the Virginia Supreme Court in his Petition for Rehearing at page 6 as follows:

> [T]he Court again has abdicated its function of assuring that the Commonwealth has disproven beyond a reasonable doubt every reasonable hypothesis of innocence, and has shifted to Mr. Whitley the burden of proving by some unspecified standard an alternative theory of the facts which is inconsistent with his guilt.

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[4] When conflicting inferences flow from even undisputed evidence, principles of appellate procedure require the Supreme Court of Virginia to adopt those conclusions most favorable to the prosecution if fairly deducible from the proven facts. Dianna Mickels Pugh v. Commonwealth of Virginia, 223 Va. ____, 291 S.E.2d ____, Slip Opinion at 4 (June 18, 1982). A copy of the Slip Opinion of the Supreme Court of Virginia is attached hereto.

However, after considering this claim, the Virginia Supreme Court found it meritless. (Petition for a Writ of Certiorari, Appendix at 3a). And, in a federal habeas corpus case, it has been analogously held that Virginia's highest court's denial of a petition, in which a violation of Virginia law was claimed, was a determination that no such violation had occurred, thus precluding the petitioner from claiming in federal court that the State Supreme Court misapplied its own law. Delph v. Slayton, 343 F.Supp. 449, 455 (W.D. Va. 1972). Any question of whether the Virginia Supreme Court violated Virginia law is a matter of State law and is not cognizable under federal review. See also Gryger v. Burke, 334 U.S. 728 (1948).

Finally, the respondent submits arguendo that even if the Supreme Court of Virginia did not correctly apply the Virginia standard of proof to petitioner's case, which the respondent does not concede, such a failure would be, at most, harmless error because it is clear from the facts of this case that this Court cannot say that no rational trier of fact could have found proof of petitioner's guilt beyond a reasonable doubt. 443 U.S. at 324. Indeed, when a record of historical fact supports conflicting inferences, a federal court must presume that such conflicts were resolved in favor of the prosecution and "must defer to that resolution." Id. at 326.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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PRESENT: All the Justices

DIANNA MICKELS PUGH

v. Record No. 810917

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON
June 18, 1982

FROM THE CIRCUIT COURT OF THE CITY OF BUENA VISTA
Rudolph Bumgardner, III, Judge

Indicted for killing her three-year-old daughter, defendant Dianna Mickels Pugh was found guilty in a bench trial of murder of the second degree and sentenced to a term of 20 years' imprisonment. The principal issue on appeal is whether the evidence is sufficient to support a finding of malice.

On July 15, 1980, about 3:00 p.m., the victim, Mary Elizabeth Pugh, was brought by ambulance from her home in Buena Vista to a Lexington hospital. The child was dead on arrival. The cause of death was acute laryngotrachael obstruction by black pepper.

The autopsy showed she had sustained multiple abrasions and contusions "of varying ages" about her face, arms, chest, back, buttocks, and legs. Even though three years old, the child weighed merely 17 pounds and was two and one-half feet tall, having the stature of a two-year-old and the weight of an average nine-months-old infant. The child's torso "was skin and bones" with no subcutaneous fat. "It looked like the baby had been starved," testified a physician in attendance at the hospital.

According to the medical examiner's report, the child's trachea was completely occluded "by large quantities of black pepper" extending downward into both bronchial branches. The respiratory passages were also blocked by pepper. In addition, the stomach was "completely packed with large quantities of black pepper."

The record shows that the defendant, about 30 years of age with a seventh-grade education, lived separate from her husband under poor economic conditions in Buena Vista with four of her young children. During the early afternoon of the "extremely hot" day in question, defendant was at home with her mother and children when the victim "just kept fretting and crying." Defendant's mother noticed her daughter was very nervous and saw her smack the victim, observing bruises about the child's body. The mother left defendant's home about 12:30 p.m.

Shortly thereafter, the victim was still crying, "whining," and was attempting to drink from "the baby's bottle," contrary to defendant's instructions to her. According to a statement made by defendant to the police the day following the crime, the victim "got on my nerves and I just hit her." Defendant used her hands, "sometimes [her] fist" to strike the child.

Then defendant forcibly put pepper into the child's mouth, stating she "just poured it from the box in her mouth." When asked the reason for placing the pepper in the child's mouth, defendant stated to the investigator, "Well, people always told me to put soap or something like that in their mouth when they cuss . . . to keep her from doing it." Defendant told the police, "I didn't mean to kill her."

About 2:45 p.m., "a young boy" telephoned the Buena Vista police dispatcher and reported "his sister was asleep and they could not wake her up." The dispatcher, having difficulty understanding the caller, asked to talk to anyone else at the home. Then defendant came to the telephone and said, "This is Mrs. Pugh, my daughter is unconscious and I cannot wake her up." When asked whether the defendant was "frantic" during her request for help, the dispatcher testified the "request was as matter of fact as though she was telling me the time of day."

Shortly thereafter, defendant's nephew arrived at her home and found defendant giving the victim mouth-to-mouth resuscitation. Defendant was "very upset," was crying, and was saying, "Mary, please breathe." In a few minutes, the first-aid squad arrived. Efforts to revive the child were unsuccessful. The victim then was taken to the hospital and defendant remained at home.

Defendant contends on appeal the evidence was insufficient to show she was "motivated" by malice and thus the trial court erroneously convicted her of second-degree murder. Referring to the evidence, defendant notes that the day in question was "uncomfortably hot;" that the children were "fussy because of the heat;" that she was extremely upset; that she did not realize the quantity of pepper administered was a lethal dose; and that she used the pepper to make the child behave without the intent to cause death.

Defendant also argues that other evidence rebuts the existence of malice. She points to her efforts to revive the child, and says the attempt inadvertently packed pepper into the respiratory system rather than cleared the air passages so the child could breathe. She also notes the medical testimony by physicians who examined and treated her at Central State Hospital, where she was sent for a court-ordered examination. One physician said she was a very unhappy, depressed, and frustrated person living an impoverished existence who, in his opinion, lacked the "intent to do harm to the child." We do not agree with defendant's contentions.

When sufficiency of the evidence is attacked, the judgment of the trial court sitting without a jury is entitled to the same weight as a jury verdict, and will not be disturbed on appeal unless plainly wrong or without evidence to support it. Code § 8.01-680; Evans v. Commonwealth, 215 Va. 609, 613, 212 S.E.2d

268, 271 (1975). When, as here, conflicting inferences flow from the undisputed evidence, principles of appellate procedure require us to adopt those conclusions most favorable to the Commonwealth if fairly deducible from the proven facts.

In Virginia, every unlawful homicide is presumed to be murder of the second degree. When the Commonwealth proves an unlawful homicide and establishes the accused as the criminal agent, the presumption, which is no more than an inference, arises, and the defendant has the burden of going forward with some evidence to show circumstances of "justification, excuse, or alleviation." Hodge v. Commonwealth, 217 Va. 338, 341, 343, 228 S.E.2d 692, 694, 696 (1976).

Code § 18.2-32 distinguishes the degrees of murder but does not define it. Murder at common law is a homicide committed with malice, either express or implied. Biddle v. Commonwealth, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965). And whether a defendant acted with malice is generally a question to be decided by the trier of fact. Bryan v. Commonwealth, 131 Va. 709, 714, 109 S.E. 477, 478 (1921).

Express malice is evidenced when "one person kills another with a sedate, deliberate mind, and formed design." M'Whirt's Case, 44 Va. (3 Gratt.) 594, 604 (1846). Implied malice exists when any purposeful, cruel act is committed by one individual against another without any, or without great provocation; "in other words, if the punishment inflicted for a slight transgression is in its nature out of all reason and beyond all proportion to the offense offered, then the inference of law is that the perpetrator was actuated by malice." Davidson v. Commonwealth, 167 Va. 451, 455, 187 S.E. 437, 439 (1936). Generally, implied malice is equivalent to "constructive malice;" that is, "malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though

malice did in fact exist." 1 Wharton's Criminal Law and Procedure § 245 at 529 (1957).

The circumstances of this case plainly show that the defendant committed a heinous, cruel act, with hardly any provocation. The deed was wholly unreasonable, and beyond all proportion to any ordinary response to the conduct of a recalcitrant three-year-old. The frail child, obviously suffering from malnutrition and weighing only 17 pounds, was beaten by defendant with her hands and fist. The child must have been in a weakened condition not only from lack of food but from past blows to her face, arms, chest, back, buttocks, and legs. If that was not enough, the accused, by force, poured so much pepper into the child's mouth that her windpipe and her bronchial tubes were fully blocked by the substance. Moreover, the child's stomach was "completely packed with large quantities" of the pepper. While other inferences may flow from this evidence, we hold the trial court's conclusion that implied malice was shown beyond a reasonable doubt was fairly deducible from the proven facts, and we will not disturb the finding that defendant is guilty of murder of the second degree. See generally Annot., 89 A.L.R.2d 396.

Defendant raises two other issues; neither has merit. She contends her uncounseled, post-crime statement to the police was involuntary. Before questioning defendant, the investigator fully advised her according to Miranda v. Arizona, 384 U.S. 436 (1966). The officer then conducted a balanced, compassionate interview, at the conclusion of which defendant acknowledged she had responded to the questions voluntarily. Having studied the entire statement in light of the conditions under which it was given, we think the trial judge properly admitted into evidence through testimony of the interrogator excerpts from defendant's interview.

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Defendant also argues the trial court erroneously admitted into evidence a hearsay statement made by her estranged husband in the presence of a physician at the Lexington hospital. After he determined the child's condition on the day in question, the physician went to a hospital room adjoining the emergency room and said to the parents, "'Your child is dead,'" stating the baby had died of asphyxiation. Immediately, the father "acted very shocked," turned to the defendant, and said, "'Oh, no, not again.'" This colloquy was admitted over defendant's objection through testimony of the physician, and properly so. The father's out-of-court declaration was admissible under the spontaneous, excited utterance exception to the hearsay rule. The statement was prompted by a startling event, announcement of the unexpected death of one's child. It was not the product of premeditation, reflection, or design, and was made under such circumstances as to preclude the presumption it was uttered as the result of deliberation. Goins v. Commonwealth, 218 Va. 285, 287, 237 S.E. 2d 136, 138 (1977).*

For these reasons, the judgment of conviction will be

Affirmed.

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*We likewise reject defendant's contention that the husband's extra-judicial statement should have been excluded as a privileged communication.